IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. ~~78~~ 78-195

RICHARD REICHEL

Petitioner.

v.

THE DISTRICT 27, UNITED
STEEL WORKERS, et al.

PETITION FOR A WRIT OF CERTIORARI

TO THE SUPREME COURT

OF THE STATE OF OHIO

Edgar W. Jones, of
AMERMAN, BURT & JONES CO., L.P.A.
250 Peoples-Merchants Trust Bldg.
Canton, Ohio 44702 216/456-2491

Attorneys for Petitioner

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CASE CITATIONS

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PETITION FOR A WRIT OF CERTIORARI

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The Petitioner, RICHARD REICHEL, respectfully prays that a writ of certiorari issue to review the judgment by the Supreme Court of Ohio rendered in these proceedings on May 5, 1978.

OPINION BELOW

The Supreme Court of Ohio dismissed an appeal brought by the Petitioner without rendering a written opinion. The opinion by the Fifth District Court of Appeals is unreported and appears in Appendix A, infra, p.p. _____. The verdict issued by the jury in the Court of Common Pleas for Stark County, Ohio, appears in Appendix B, infra, p.p. _____.

JURISDICTION

The judgment of the Supreme Court of Ohio, the highest Court in Ohio, was rendered on May 5, 1978. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of the Court is invoked pursuant to 28 U.S.C.A. Section 1254 (1).

QUESTIONS PRESENTED

The Petitioner, RICHARD REICHEL, was running against Robert Freeman for election to the Ohio Senate. During the course of the campaign for this election, Respondents Warren Smith, the Ohio AFL-CIO and District 27 Steel Workers published a leaflet libeling the Petitioner. The questions thereby arising are:

1. Whether the action of the Ohio Supreme Court in affirming a judgment against Petitioner on the basis that certain statements found by a jury to be libelous under N. Y. Times v. Sullivan, 376 U.S. 254 (1964) are constitutionally protected violates the First Amendment to the United States Constitution.

2. Whether the actions of the Ohio Supreme Court in denying Petitioner's redress for being libeled during an election campaign denies protection to both the electoral process and the Petitioner

under the First and Fourteenth Amendments to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

Constitution of the United States, Amendment XIV, Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the law."

STATEMENT OF FACTS

This case originated upon the filing of a complaint for libel in a

case involving the integrity of the electoral process.

In November 1974, Respondents printed 50,000 copies of a leaflet falsely and maliciously impugning the character and voting record of the Petitioner, who was running for a seat in the Ohio Senate. Replete with lies and prejudicial distortions portraying the Petitioner's position with regard to labor as being "vicious, and loaded with sarcasms and half-truths", the leaflet was distributed to members of the Ohio AFL-CIO, District 27 Steel Workers in the Massillon, Ohio, area for the express purpose of subverting the Petitioner's campaign in favor of the campaign of the Petitioner's opponent, who subsequently won the election by a very narrow margin. Trial by jury commenced on November 3, 1976, in the Court of Common Pleas of Stark County, Ohio. As a result of Respondent's

libelous action, the jury found in favor of the Petitioner in the amount of $50,000.00 compensatory damages and $250,000.00 punitive damages. The Respondent perfected an appeal to the Fifth Appellate District Court of Appeals, which reversed the trial court's verdict and entered judgment for the Respondents. The Ohio Supreme Court overruled the Petitioner's appeal and entered judgment for the Respondents on May 5, 1978.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW DENIES CONSTITUTIONAL PROTECTION TO THE ELECTORAL PROCESS AND PETITIONER BY PERMITTING STATEMENTS WHICH ARE LIBELOUS UNDER THE N. Y. TIMES V. SULLIVAN TEST TO INTERFERE WITH THE INTEGRITY OF THE ELECTORAL PROCESS.

To date, the electoral process does not enjoy express constitutional protection

from actions designed to subvert its operation by the use of calumnious allegations. It is respectfully submitted that this Court should speak to the fact that the integrity of our elections is worthy of constitutional protection. Today, when dissemination of statements to the electorate has become, for all practical purposes, instantaneous, it is appropriate to delineate the ramifications of abuse which interferes with the election process. Elections based on honest debate, differences of opinions and fair scrutiny of political positions deserve constitutional protection. By reversing the Ohio Supreme Court, this Court would uphold the constitutionality of Petitioner's right to run for public office free from libelous statements which exceed the bounds of vigorous advocacy.

2. THE DECISION BELOW ENCOURAGES DECEPTIVE CAMPAIGN PRACTICES AND DENIES

THE RIGHT OF THE PETITIONER TO RUN FOR PUBLIC OFFICE FREE FROM LIBEL ALL UNDER A MISTAKEN INTERPRETATION OF THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION AND THIS COURT'S RULINGS THEREUNDER.

The decision of the Ohio Supreme Court denies Petitioner the protection found in New York Times Company v. Sullivan, 376 U.S. 254 (1964) by vacating an award of damages in libel predicated upon a finding of actual malice. This Court's reversal of the Ohio Supreme Court would not produce a "chilling" effect on usual campaign rhetoric, nor would it inhibit open, robust or full discussion. Reversal would exclude from constitutional protection those false statements of fact designed to prejudice and damage a candidate. Fair comment and statement of opinion characterizes healthy election practices and should be permissible even though honest mistakes or negligent misstatements detract from

a candidate's reputation. As the Court in New York Times Company v. Sullivan, supra, at 269, stated in citing Roth v. The United States, 354 U.S. 476, 479, the constitutional safeguard of free speech "was fashioned to assure unfettered political and social changes desired by the people." This Court, however, has stressed that libel does not enjoy "talismanic immunity from constitutional limitations." New York Times Company v. Sullivan, supra, at 269. Therefore, the Respondent's publication of lies, with actual malice or in willful disregard of the truth or falsity of such published statements, falls outside the purview of constitutional protection, and damages for libel should be awarded by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the Supreme Court

of Ohio's judgment which raises serious questions regarding libelous statements, which are not entitled to the free speech protection of the First and Fourteenth Amendments, when such statements directly interfere with the integrity of the electoral process as well as with the Petitioner's personal right not to be defamed.

Respectfully submitted,

Edgar W. Jones, of
AMERMAN, BURT & JONES CO., L.P.A.
250 Peoples-Merchants Trust Bldg.
Canton, Ohio 44702 216/456-2491

Counsel for Petitioner

August 2, 1978

PROOF OF SERVICE

I, Edgar W. Jones, one of the attorneys for Richard Reichel, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby

certifies that on the 3rd day of August, 1978, I served copies of the foregoing Petition of Certiorari to the Supreme Court of the United States on the parties hereto as follows: United Steelworkers of America, District 27, 1330 Market North, Canton, Ohio; Harry Mayfield, 2861 Thackeray N.W., Massillon, Ohio 44646; Ohio AFL-CIO, 271 East State Street, Columbus, Ohio; Warren J. Smith, 60 West Schreyer Place, Columbus, Ohio, by first class postage prepaid on the counsel of record for all of the above named parties, David Clayman of the law firm Clayman and Jaffy, 71 East State Street, Columbus, Ohio 43215.

It is further certified that all parties required to be served have been served.

Edgar W. Jones, Attorney
for Richard Reichel

SC-16A Barrett Printing, Publishers, Springfield, Ohio

THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*78 *TERM*

To wit: May 5, 1978

Richard Reichel,
Appellant,

vs.

District 27, United Steelworkers etal.,
Appellees

No. 78-355

APPEAL FROM THE COURT OF APPEALS

for STARK *County*

This cause, here on appeal as of right from the Court of Appeals for Stark *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION ONLY NOT FOR FILING

O'Neill, C. J., not participating. P. Brown, acting C. J. McCormac, J., sitting for P. Brown, J.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Stark *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this......*day of*............ *19*......

............*Clerk*

............*Deputy*

SC-A Barrett Printing, Publishers, Springfield, Ohio

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

*19*78 *TERM*

To wit: May 5, 1978

Richard Reichel,
Appellant,

vs.

District 27, United Steelworkers et al.,
Appellees.

No. 78-355

MOTION FOR AN ORDER DIRECTING THE COURT OF APPEALS

for STARK *County*

TO CERTIFY ITS RECORD

It is ordered by the Court that this motion is overruled.

FOR YOUR INFORMATION ONLY NOT FOR FILING

O'Neill, C. J., not participating. P. Brown, acting C. J. McCormac, J., sitting for P. Brown, J.

COSTS:

Motion Fee, $20.00, paid by Amerman, Burt & Jones

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court

this......*day of*............ *19*......

............*Clerk*

............*Deputy*

IN THE COURT OF APPEALS OF OHIO

STARK COUNTY

RICHARD REICHEL) No. 4565

Plaintiff-Appellee

vs.)

DISTRICT 27, UNITED STEELWORKERS' et al)

Defendant-Appellants

O P I N I O N

Rendered on the 14th day of December, 1977.

Clayman & Jaffy, David Clayman and Stewart R. Jaffy, 71 East State St. Columbus, Ohio
Attorneys for Appellants

Amerman, Burt & Jones Co., L.P.A. William D. Wendell, 250 Peoples-Merchants Trust Bldg. Canton, Ohio
Attorneys for Appellee

Stephenson, J.,

This is an appeal from a judgment of the Court of Common Pleas of Stark County entered in conformity with a jury verdict in favor of Richard Reichel, plaintiff below and appellee herein, in a defamation action. The judgment was for $300,000.00 in damages, and entered against Warren Smith and Harry Mayfield, who are respectively Secretary-Treasurer of the Ohio AFL-CIO and Director of District 27, United Steelworkers. These two organizations are also joined as defendants in this action, all of whom are appellants herein.

This action arose out of events surrounding the political campaigns in November of 1974 for State Senator in the Ohio Senatorial District 29. The plaintiff, Richard Reichel was the Republican candidate for election to the office of State Senator, and opposed by Democrat Robert Freeman for such office. Mr. Freeman was the victor in the elec-

tion contest, although by a very narrow margin of victory.[1]

In the course of the campaign, Mr. Freeman received the formal support of the Ohio AFL-CIO and District 27 of the United Steelworkers of America. Through their elected officials, these organizations caused to have printed a campaign leaflet which is the keystone of this law suit.[2] The leaflet attacked Mr. Reichel's prior legislative record as an elected member of the State, House of Representatives, and then as an appointed member of the Ohio Senate. Its thrust was to identify Mr. Reichel as an enemy of organized labor and, thus, to the working man in general.

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[1]The record reflects 90,000 votes were cast, of which Mr. Freeman received 50.8% and Mr. Reichel 49.2%.

[2]The leaflet is reproduced and appended to the end of this opinion.

The leaflet was prepared by Mr. Warren Smith, Secretary-Treasurer of the Ohio AFL-CIO, and distributed under the name of Harry Mayfield in his official capacity as Director of District 27, United Steelworkers. Although Mr. Mayfield authorized the use of his name and office, he was unaware of the specific contents of the campaign literature at the time of preparation and distribution.

Approximately 50,000 such leaflets were printed. Although certain undisputed testimony revealed that roughly 14,000 were never circulated, the remainder were distributed, at least in part, by various local union officials at factories and mills throughout Senate District 29. They were distributed on the weekend before the Tuesday election (November 5, 1974).

Besides criticizing Mr. Reichel's legislative efforts and identifying them as being out of step with the policies of organized labor, the leaflets contained two statements which were conceded to be mis-statements of fact. These mis-statements alleged that Mr. Reichel had, as a legislator in 1963, taken positions adverse to those of organized labor on key issues concerning unemployment compensation and workmen's compensation. In fact, Mr. Reichel was first elected to the legislature in 1966, and had nothing to do with 1963 state legislation.

Mr. Reichel first viewed the leaflet on Sunday, November 3, 1974. The next day he set out for and contacted all the radio stations and newspapers in Stark County, for the purpose of issuing a short statement exposing the falsehoods

contained in the leaflet. James Burnett, news director for WHBC Radio of Canton, Ohio, called Harry Mayfield to confront him with Mr. Reichel's statement. Mr. Mayfield disclaimed any knowledge of the contents of the leaflet, and referred him to Warren Smith. When Smith was reached, he conceded that some mistake must have been made in the hurried rush to print and distribute the leaflet, and that the information was erroneous as to the events regarding 1963. Mr. Smith's admission of error in the pamphlet was subsequently broadcast twice on the day before the election upon news programs of the radio station.

Mr. Smith, after having the mis-statements brought to his attention, telephoned Mr. Reichel. Although it is disputed whether any apology was tendered at this time, Mr. Smith did acknowledge his

responsibility for the erroneous material and admitted that it was "wrong".

Nearly a year after his defeat, Mr. Reichel filed this defamation action against defendants claiming, essentially, at trial that the leaflet constituted a "smear" attack which caused him to lose the election, and praying for $200,000.00 in compensatory damages and $800,000.00 in punitive damages.

In seeking reversal of the judgment below appellants raise nineteen assignments of error. This lengthy parade of alleged errors are set forth below, and then reviewed in sequence:

"1. The verdict and judgment deprive these Appellants of their constitutional right to freedom of speech and freedom of the press guaranteed by the First and Fourteenth Amendments of the Constitution of the United States and Section 11 of Article I of the Constitution of Ohio.

2. The constitutional test in a public official libel action of

of actual knowledge as to falsity, or that the Defendants had serious doubt as to the truth of their publication was not met and the reviewing court should reverse the decision below and grant judgment for Defendants.

3. The trial court erred in permitting the case to go to the jury and in failing to direct the verdict for Defendants where Plaintiff failed to prove the elements of a libel case because there was no defamation as a matter of law.

4. The trial court erred in permitting the case to go to the jury and in failing to direct the verdict for Defendants where Plaintiff failed to prove the elements of a libel case because no damages were proven as a matter of law.

5. The verdict and judgment are contrary to law and the evidence.

6. Error was committed in excluding certain testimony of the expert witness.

7. The Court erred in overruling objections permitting testimony which was prejudicial.

8. The trial court committed prejudicial error by admitting Exhibits 3, 4, 6, 7 and 8.

9. The trial court erred in refusing to give to the jury a special instruc-

tion on proximate cause requested by Appellants (attached hereto as Appendix D).

10. The trial court committed error in its charge to the jury which requires reversal of the decision:

A. The Court erred by charging on a purported cause of action under Revised Code Section 3599.09.

B. The Court erred in instructing on damage to reputation when no evidence was presented on this point.

C. The Court erred in its instruction on actual (common law) malice for punitive damages.

11. The Court erred by its instructing the jury to answer the interrogatories by the preponderance of the evidence because such instruction violates the constitutional requirement that proof be by clear and convincing evidence.

12. The court erred in permitting the punitive damage question to go to the jury.

13. The punitive damages award is improper and necessitates reversal; the punitive damages award is unconstitutional.

14. The trial court erred in the rejection of proper evidence offered by Appellants.

15. The amount of the verdict is excessive.

16. The jury, under the influence of passion and prejudice, rendered its verdict on damages.

17. Improper argument made by Attorney Reichel in closing argument necessitates reversal.

18. The Court erred by not sustaining the objection during final closing arguments made to Counsel Reichel's misquoting a criminal statute and by failing to admonish counsel immediately and immediately instructing the jury properly.

19. The trial court erred in its general instructions to the jury.

The first and second assignments of error are twin expressions of the same argument, that is, that the judgment intrudes into the protected sphere of free speech under the First Amendment of the United States Constitution, as defined under the landmark decision of New York Times vs. Sullivan, 376 U.S. 254 (1964), and its progeny. We are inclined to consider these assignments

together, as do appellants in their brief.[3]

There is no question that the New York Time's "actual malice" test is applicable, since that standard is triggered by appellee's status as a political candidate. See Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971). Therefore, the defamation judgment may stand only if there are facts in the record which disclose that the falsehoods were published with "actual malice", which is defined to be "knowledge that it was false or with reckless disregard of whether it was false or not." New York Times v. Sullivan, supra, at 279. In sum, the facts must reveal an intent

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[3]For the purpose of our review of these first amendment questions we assume for the sake of discussion that the mis-statements constituted libel. That assumption is addressed forthrightly in our disposition of the third and fourth assignments of error.

to inflict harm through falsehood. Henry v. Collins, 380 U.S. 356 (1965) (per curiam). In proving facts sufficient to clear this high standard of conditional privilege there is also an evidentiary hurdle that such proof be made with clear and convincing evidence. New York Times v. Sullivan, supra ("convincing clarity"); Rosenbloom v. Metromedia, 403 U.S. 29 (1971), overruled on other grounds; Gertz v. Robert Welch Inc., 418 U.S. 323 (1974); Firestone v. Time, Inc., 460 F. 2d 712 (5th Cir.), Cert. denied, 409 U.S. 975 (1972); Hotchner v. Castillo-Puche, 551 F. 2d 910 (2nd Cir., 1977) (appeal pending); Fodell vs. Minneapolis Star & Tribune, 557 F. 2d 107 (7th Cir., 1977).

At the outset of our analysis we conclude from our independent review that no proof was offered at trial to show

that any of appellants had actual knowledge of the falsehoods at the time of publication. The undisputed testimony of appellant Mayfield was that he never reviewed the specific contents of the leaflet despite the that that it was circulated under his name as Director of District 27, United Steelworkers. Nor was any proof tendered to show that the author of the leaflet, appellant Smith, had any actual knowledge that the leaflet contained falsehoods.

Our focus is, therefore, narrowed to the single issue of whether the judgment below is supported by clear and convincing proof that appellants published the leaflet with reckless disregard of whether the contents were true or not. Although this arm of the "actual malice" standard is the one most frequently tested in the courts, the results of those

cases bear out the observation that if the burden of proof is somewhat relaxed in these cases, it still is more than most defamed plaintiffs can bear.[4] Thus, the cases hold that there is a necessity for showing that the falsehoods were published with "a high degree of awareness of probable falsity," Garrison v Louisiana, 379 U.S. 64, 74 (1964), or "sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v Thompson, 390 U.S. 828, 731, (1968).

The following is an amplication of the evidence presented at trial to which we must apply the principles set forth above.

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[4] The New York Times rule is unquestionably the greatest victory won by the defendants in the modern history of the law of torts." D. Prosser, LAW OF TORTS, Sec. 118 at 819 (2d Ed. 1971).

Appellant Smith was, since 1959, connected with the statehouse lobbying efforts of the Ohio AFL-CIO. He appeared periodically before different committees, met and talked with legislators, and attempted to influence the outcome of certain bills upon which the Ohio AFL-CIO had taken a position. From this experience he knew Mr. Reichel. From the voluminous testimony that was received on various pieces of legislation, including workmens compensation and unemployment insurance, that came before Mr. Reichel since he joined the legislature, we can safely conclude that Mr. Reichel's viewpoints often did not converge with those of the Ohio AFL-CIO.

Since 1967 appellant Smith has been the elected Secretary-Treasurer of the Ohio AFL-CIO, whose office is in charge of publications, and is involved with political campaign work. In this particular campaign, appellant Smith came to

Canton, Ohio, on Monday, October 28th, to a meeting with local persons which included other labor officials. Although the testimony was vague, it appeared that some concern was voiced at this meeting about the sagging campaign of Mr. Reichel's Opponent, Mr. Robert Freeman.[5] As this particular race was one of seven statehouse races that the Ohio AFL-CIO was actively involved in campaign work, it was resolved that a leaflet would be prepared on Mr. Reichel's voting record. Appellant Smith, upon request, agreed to prepare the leaflet. It was also agreed to request the assistance of appellant Mayfield in distributing the leaflet. Later that day Mayfield consented to the use of his name and office on the leaflet,

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[5]The only trouble that was identified at trial was the failure of the campaign organization to distribute literature on the weekend before the Monday meeting.

because it was felt that the leaflet would have greater local impact.

It was undisputed that the preparation was a hurried rush due to the late hour of the campaign. Smith worked at night in preparing the leaflet. The leaflets were printed and returned to Smith's office on Wednesday, whereupon they were shipped to Mayfield and other local union officials.

Appellant Mayfield had those shipped to him distributed without ever reading the leaflet.

There was also testimony concerning other Ohio AFL-CIO publications, one preceding and one subsequent to the election, which attested to the particular interest the Ohio AFL-CIO had in defeating Mr. Reichel.[6] There was, finally, the testimony of Frank King, former President of

[6]Prior to the election, a special campaign issue of Focus, a monthly publication of

the Ohio AFL-CIO, and former state legislator. Mr. King testified that, as President of the Ohio AFL-CIO, he was forced to assume direct supervision over the publications issued by that organization because they were, under appellant Smith's direction, losing credibility because of slanted reporting and factual errors. There was at least one confrontation between him and Smith where Mr. King demanded that an article be changed. He also testified that appellant Smith

6(cont.) the Ohio AFL-CIO, stated that "The reelection of Richard Reichel would be like giving Jack the Ripper a set of stainless steel knives." Following the election an issue of News and Views dated November 8, 1974, a weekly publication of the Ohio AFL-CIO for union officers stated that: "Republicans going down to crushing defeats were Senators Clara Weisenbonn (Dayton), Robert Corts (Lorain), Paul Matia (Cleveland), Charles Bolton (Mentor) and Richard Reichel (Massillon). We are especially pleased with the defeat of Reichel. During his six years in the Ohio House and two years in the Senate, Reichel not only opposed legislation to help workers, but did it with vindictiveness and spite."

had a very bad reputation for truthfulness and honesty, although this was heavily disputed by other witnesses.

On the basis of this evidence, we conclude that each of the appellants were entitled to a directed verdict in their favor because of the failure of appellee to meet his burden of proving by clear and convincing evidence that the leaflets were published with a high degree of awareness of probable falsity of the contents therein. Restated, we are of the opinion that reasonable minds could not differ on the question of whether appellants were shown by clear and convincing evidence to have in fact entertained serious doubts as to the truth of the assertions made in the leaflet.

As to appellant Mayfield, there is no room for argument. As he was never aware of the contents of the leaflet he was, as a matter of law, not guilty of reckless

disregard for truth. New York Times v Sullivan, supra. In that case, the United States Supreme Court considered, under the "actual malice" test, the judgments against persons whose names appeared on an advertisement which had been adjudged defamatory. In reversing, the Court stated:

> "The case of the individual petitioner requires little discussion. Even assuming they could constitutionally be found to have authorized the use of their names on the advertisement, there was no evidence whatever that they were aware of any erroneous statements or were in any way reckless in that regard. The judgment against them is thus without constitutional support. New York Times v Sullivan, supra, at 286. (Emphasis Added)

As the record reveals no cause of action against District 27, United Steelworkers that would survive the dismissal of the action against appellant Mayfield, it also was entitled to a directed verdict.

Although the proof against appellant Smith was stronger, we believe it to be

constitutionally deficient. The critical factual question here was, did he know at the time of publication that Mr. Reichel was probably not in the state legislature in 1963, and thereby have serious doubts as to the truthfulness that he was among those which had taken positions adverse to those of organized labor. Had the jury been free to infer that he might have entertained serious doubts, perhaps because of his background, or because of their acceptance of Mr. King's appraisal of Smith's reputation for untruthfulness, or perhaps because of the importance attached by the Ohio AFL-CIO to the outcome of this election, we would hold that it would be a factual issue upon which reasonable minds could differ and, thus, a jury issue. Under the burden of proof in these type cases, however, reasonable minds could not, in our view, differ upon whether such proof was clear and convincing.

Through Frank King's testimony, appellee sought to establish appellant Smith's reputation for slanted and inaccurate news reporting in the publications of the Ohio AFL-CIO. However, such testimony was colorless on whether the mistakes in the past were the result of "actual malice". Furthermore, it has been held by one federal court that "proof of a controversial reputation, even of a reputation for indecency or vulgarity. . . .is irrelevant." Washington Post Co. v Keogh, 365 F. 2d 965, 972 (D.C.Cir., 1966), Cert. denied, 385 U.S. 1011 (1967), (Wright, J.,). In that case the plaintiff sought to prove that because of Drew Pearson's notorious reputation for journalistic inaccuracies, it constituted "actual malice" for a newspaper to publish Pearson's articles without first verifying the factual basis. On this issue the court stated:

> "Proof of isolated instances of inaccuracy. . .cannot be accorded significance, since the relevant rule of law contemplates that 'erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the breathing space they need to survive.'" Washington Post Co. v Keough, supra, at 971-72. (Citations omitted)

Nor does the record reveal facts which would under any standard of liability, negligence or "actual malice", establish that there was obvious reasons to doubt the veracity of the report. James v Gannett, 40 N.Y. 415, 353 N.E. 2d 834 (1976). Although it is clear that appellee was not in the legislature in 1963, the appellants did show that, in their minds, Mr. Reichel did assume positions as legislator which were consistent with the views they erroneously attributed to him in 1963. Therefore, there appeared no obvious reasons to doubt the factual assertions contained in the leaflet. Had the assertions lacked any substance, such as if Mr. Reichel had never expressed any views on the issues of unemployment insurance or workmens compensation, we would have a much different situation, for there it might appear to a jury that the "story (was) fabricated by the defendants, (as) the product of his imagination. . ." St. Amant v Thompson, 390 U.S. 727, 732 (1968). In this case, however, the sum and substance of the erroneous material was in designating Mr. Reichel as a legislative opponent of the policies of organized labor prior to the time when he, in fact, assumed that role in the eyes of labor leaders. We believe this type of error to lie in the breathing space of the First Amendment, where such errors are tolerated only because of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . ." New York Times v Sullivan, supra, at 272. We hold that the first and second assignments

of error are well taken.

By their third assignment of error appellants contend that they were entitled to a directed verdict because the facts alleged by appellee are, as a matter of law, insufficient to establish a cause of action in defamation. We interpret this argument to be that, even when construing the facts most strongly in favor of appellee, that the statements made in the leaflet are not actionable.[7] Appellee, in his complaint, alleged that the leaflet was defamatory as to his business reputation as attorney and public official. Our inquiry, therefore, is whether the asser-

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[7]For the purposes of this assignment of error, we assume for the sake of argument that the false assertions contained in the leaflet were published with "actual malice", thus, leaving the question of whether the misstatements were defamatory in the first instance.

tions contained in the leaflet would, if true, support a defamation action.

The leaflet (see appendix) makes the following characterizations and allegations: that Mr. Reichel pretends to be a friend of the worker, but isn't; that Mr. Reichel's voting record was anti-worker, that he has sided consistently with "the most conservative (Timken) management viewpoints"; that his opposition (to labor's viewpoints) is "vicious and is loaded with sarcasms and half-truths"; that Mr. Reichel supported legislation (H.B. 72) that ostensibly was introduced to bring order to campus riots, but through carefully drafted language would have permitted the use of the Ohio Highway Patrol to break strikes; that he supported a correcting amendment to H.B. 72 only after he and his friends were convinced the bill would not pass; that Mr. Reichel supported legislation that usually hurt the unemployed worker; that in 1963 he supported legislation that

would disqualify Ohio workers from recovering unemployment benefits when they were laid off because of strikes in another state; that more recently he supported amendments to the laws regarding unemployment and workmens compensation, but only after agreement was first reached between management and labor; that in 1963 Mr. Reichel assisted employer groups in inserting crippling amendments in Ohio Workmens Compensation law that cost workers millions of dollars in benefits before the amendments were declared unconstitutional; that Mr. Reichel has never been a friend to consumer advocates; that he opposed "head-on" legislation to restrain the use of the cognovit note and reform Ohio's garnishment law, which caused Ohio to have the highest personal bankruptcy rates in the nation; that Mr. Reichel voted "with the bankers" to remove an 8% limit on home loans.

The court below decided, correctly we think, that the statements in the leaflet were not libel per se, which are words "of such a nature that courts can presume as a matter of law that they tend to degrade or disgrace the person of whom they are written or spoken, or hold him up to a public hatred, contempt or scorn." Moore v. P.W. Publishing Co., Inc., 3 Ohio St. 2d 183, 188 (1965), Cert. denied, 382 U.S. 978 (1966). As to whether the statements were defamatory at all was a question the court reserved for the jury.

We are inclined to view most of the leaflet's assertions non-defamatory as a matter of law. Thus, we feel that no relational interest is injured or held up to public hatred when either one's voting record or personal viewpoint is characterized as "anti-worker" or "not a friend to the working man." As to whether either is true or false depends entirely upon the political perspectives

in the eye of the beholder. In other words, such characterization is essentially an opinion whose truth or falsity is not susceptible to legal proof. "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges or juries but on the competition of other ideas." Gertz v. Robert Welch, Inc., 418 U.S. 323,339-40 (1974). This is especially the case in the world of labor-management relations in which everything and everybody comes seemingly in two flavors: pro-management and pro-labor. We conclude that such inartful characterizations are simply too "loosely definable, variously interpretable statements of opinion" to be adjudged as defamatory. See Buckley v. Littell, 539 F.2d 882, 895 (2nd Cir., 1976) (U.S. Cert. denied).

Our conclusion is fortified by the observation that the thrust of the leaflet's assertions, that Mr. Reichel was not a friend of the working man because of his legislative record, has no bearing at all upon his business reputation as an attorney. Obviously, one's political viewpoints upon labor relations casts no shadow upon one's skill and professionalism required of attorneys. "It is, of course, true that words that will adversely affect a man in his occupation are relative to the nature of that occupation." Bigelow v. Brumley, 138 Ohio St. 574, 591 (1941).

Neither do we believe that the false attribution of a voting record is defamatory, at least in this case. The appellants mistakenly placed Mr. Reichel in the state legislature in 1963. Assuming that had he been there at that time, and cast his vote "for" labor, only to have some publication later state that he voted "against" labor, we fail to perceive any ridicule or degradation flowing out of

that mistake. Not every falsehood bearing upon an individual or his conduct is defamatory; most are not. Thus, it is sometimes stated that it is not defamatory to falsely implicate a person with doing something which he may legally and properly do. See Grayson v. Savannah News-Press, Inc., 10 Ga. App. 557, 139 S.E. 2d 347 (1964); Bollenbacker v. Society for Savings, 148 Ohio St. 649 (1947). Although this principle is not absolute, it does adequately reach the assertions here under question.

Likewise, we do not feel that the statement attributing Mr. Reichel to being a "'built-in' lobbyist for the most conservative (Timken) management viewpoints" carried any defamatory implication. The thrust of this charge is to identify Mr. Reichel as an advocate of conservative viewpoints. "Built-in" merely refers to the fact that he was a member of the General Assembly and not

retained on the "outside" as a professional lobbyist. Such characterization would not injure a person in his calling as either an attorney or a public official.

> "To lobby legally before the General Assembly, certain statutory requirements must be fulfilled. It is not suggested that plaintiff has not complied with these . . . We do not believe that the fact that in the case at bar the plaintiff is charged with lobbying for pay in furtherance of a political and economic movement, rather than on his own behalf, changes the legal consequence. There is nothing immoral or disgraceful in accepting pay to influence in a legitimate manner the deliberations of a legislative body." Bigelow v. Brumley, 138 Ohio St. 574, 592-93 (1941). (Emphasis added)

However, we believe that the statement accusing Mr. Reichel's opposition to the position of organized labor as being "vicious, and loaded with sarcasms and half-truths" could reasonably be received as a defamatory utterance that could injure the business reputation of appellee as an attorney and his standing in the eyes of the public as a trustworthy

and honest legislator and, therefore, that the third assignment of error is not well taken.

Appellants claim through their fourth assignment of error that they were entitled to a directed verdict because no special damages were shown to support the judgment. For the reasons stated below, we hold the assignment to be well taken.

It is elementary under Ohio law that in a case of libel per quod, such as in this case, no cause of action is stated unless special damages are pleaded and proven. Becker v. Toulmin, 165 Ohio St. 549 (1956). At trial, appellee sought to establish special damages in two different forms: (1) the out-of-pocket costs incurred by Mr. Reichel in driving to the media centers throughout Senatorial District 29 on the day before the election for the purpose of rebutting the assertions published in the leaflet; and (2) the loss of the election, with the resulting loss of salary over a four year term.

Since the out-of-pocket expenses are entirely the result of appellee's own conduct in causing money to be expended to deny and refute the statements, we hold that such expenses are not compensable without having his cause of action independently established. See Bigelow v. Brumley, 138 Ohio St. 574 (1941).

We further conclude as a matter of law that the loss of the election with its attendent loss of salary is not compensable as special damages. Although we have found no Ohio authorities on this issue, it appears that our conclusion, that the loss of election is not compensable, is in conformity with the weight of authority elsewhere. Southwestern Publishing Co., Inc. v. Horsey, 230 F. 2d 319 (9th Cir., 1956); Taylor v. Moseley, 170 Ky. 592, 186 S.W. 634 (1916); Otero v. Ewing, 162 La. 453, 110 S.648 (1926).

Appellee cites only one case, a 1924 decision by a divided intermediate New York Appellate Court, in his argument that lost

elections, if proven, are compensable. In that case, Cortright v. Anderson, 202 N.Y.S. 729 (App. Div. 1926), the appeal was heard upon a motion testing the sufficiency of the complaint, upon which the court was bound to assume as true the allegations of the complaint, notwithstanding difficulties of proof. Therefore, the court assumed as true that the libelous publication necessarily resulted in the loss of the election.

Such New York authority, standing alone, is unpersuasive when considered in the light of the reasons advanced in the above authorities concluding otherwise. As has been aptly stated: "There may be not less than a thousand factors which enter into the vagaries of an election. . .," which would open the door to an evidentiary exploration into every single vote, "the net result of such exploration into the uncertainties of an election can only lead to confusion." Southwestern Publishing Co. v. Horsey, supra, at 323.

By reason of the dispositions of the above assignments of error, (Nos. 1, 2 and 4) it follows that the judgment must be reversed and final judgment entered in favor of appellants. By such action the remaining assignments of error are rendered moot. We pass upon such remaining assignments of error, however, pursuant to the requirement of App. R. 12(A).

As to the sixth assignment of error, in view of this court's determination as a matter of law that the loss of the election with its attendant loss of salary is not compensable as special damages, this assignment of error is moot in that the expert's opinion related directly to the issue of the effect of the pamphlet on the outcome of the election. But for our conclusion as a matter of law that the loss of the election is not compensable, this assignment of error is well taken. The rejection by the trial court of the findings of the well qualified expert was also prejudicial error. McKay

Machine Co. v. Rodman, 11 Ohio St. 2d 77 (1967); Trebotich v. Broglio, 33 Ohio St. 2d 57 (1973); 21 Ohio Jur. 2d 419, Evidence, Secs. 411, 415, 421, 422. Proposed Ohio Rules of Evidence, 702, 702 (sic), 704, 705.

Assignment of error number seven states that the court erred in overruling the objections permitting testimony which was prejudicial. Particular reference is made by appellants to the testimony of former legislator, Mr. Tully, and former president of the Ohio AFL-CIO. Generally, no specific objections were made to the questions asked of these two witnesses to which answers were given that are now claimed by appellants to be objectionable; nor was there a timely motion made to strike the claimed objectionable answers. Considering the wide latitude given to the trial court in regard to the exclusion and inclusion of evidence, we find no error as to the testimony of these two witnesses. Johnson v. English, 5 Ohio App.

2d 109 (1966); Kent v. State, 42 Ohio St. 426 (1884); State v. McDonald, 25 Ohio App. 2d 6 (1970); 3 Ohio Jur. 2d Appellate Review, Secs. 204, 206, 871, 893. The determination of the admissibility of evidence is within the province of the trial court. 52 Ohio Jur. 2d, Trial, Sec. 60; Morris v. Stone, 33 Ohio App. 2d 101, 104 (1972).

In assignment of error number eight the appellants claim that the trial court committed prejudicial error by admitting exhibits 3, 4, 6, 7 and 8. Again, considering the wide latitude the trial court has in admission of evidence, we find no error in the admission of these exhibits. Each exhibit related to some extent to the question whether the plaintiff was anti-worker (union) or not. The trial court did not abuse its discretion by admitting these exhibits. In addition to the citations, supra, as to assignment of error number seven, see, also, Ohio Jur. 2d, Evidence,

Sec. 2. Further, even if the court erred in admission of any of the exhibits in question, the error was harmless under Civ. R. 61.

Although the ninth claim of error is essentially rendered moot by our disposition of the fourth assignment of error, the reasoning thereunder compels us to hold this assignment of error to be well taken. The first instruction is consistent with our holding that lost elections in Ohio are not among those injuries which are compensable in money damages, and was improperly rejected by the trial judge. As to the second requested charge above, we sustain the assignment of error insofar as it, when read in conjunction with the first requested charge, recognizes that no other special damages were, as a matter of law, pleaded or proven by appellee. The refusal to give these two instructions constituted prejudicial error.

Assignment of error number ten is directed to claimed errors in the court's charge to the jury. The record discloses a finding by the trial court, after an evidentiary hearing upon the correctness of the record, that the record be corrected to provide with respect to objection to the general charge:

> "(This motion was made after the jury had retired to deliberate and after the court had left the bench and while the jurors were leaving the court room and out of the hearing of the judge and jury.)"

Civ. R. 51(A) requires as a predicate for appellate review that objections to the charge be made "before the jury retires to consider its verdict." It follows that the objections here were subsequent to retirement of the jury. The assignment of error is overruled.

The thrust of assignment of error number eleven is that the court erroneously instructed the jury to base its answers to interrogatories by a preponderance of the evidence. The general instruction of the

court was, in substance, that the issues be resolved upon a clear and convincing standard. The purpose of Civ. R. 49 in allowing interrogatories to accompany a general verdict is for the purpose of testing the correctness of the general verdict. (Ragove v. Vitali & Beltrami, Jr., Inc., 42 Ohio St. 2d 161 (1975). As a matter of necessity and simple logic, if an answer to an interrogatory is to fulfill such purpose, both the general verdict and interrogatory answers as to pivotal issues upon which the general verdict rests must be resolved by the same burden of proof standard. Instructing the jury to answer the interrogatories, based upon the preponderance of the evidence, all of which related to the "actual malice" issue, was error.

Although the court charge as to the interrogatories conformed to the instructions appearing in Ohio Jury Instructions, Sec. 25.30, Interrogatories (OJC 1968), that instruction presupposes that the burden of

proof requirement to reach the general verdict is also based upon a preponderance of the evidence instructions. When conflicting instructions are given as to the burden of proof, a likely result is prejudicial jury confusion with no means available to ascertain which standard of proof was followed in returning the general verdict. See 4 Ohio Jur. 2d 280, Sec. 998. Cf. Shapiro v. Kilgore, C & S Co., 108 Ohio App. 402 (1959).

In Rosenberry v. Chumney, 171 Ohio St. 48 (1960), it was held that instructions to a jury in submitting interrogatories to a jury is a part of the charge of the court. It would appear from the record no timely objection to the charge was made in accordance with Civ. R. 51(A). The subsequent objection when the instructions as to the preponderance of the evidence was repeated in answer to a jury question does not save the issue for review inasmuch as the record reflects the objection was after the jury retired to continue its' deliberations.

While we recognize the obvious importance of the error here considered, in light of our reversal herein on other grounds, we deem it unnecessary to consider if such error, even though not properly objected to, is of a magnitude to be fundamental error and recognizable irrespective of failure to object. See Youngwirth v. McAvoy, 32 Ohio St. 2d 285 (1972).

Assignments of error twelve and thirteen seek to overturn the award of punitive damages. Thus, in assignment number twelve, appellants argue that "The court erred in permitting the punitive damage question to go to the jury," and in number thirteen, it is argued that "The punitive damages award is improper and necessitates reversal; the punitive damages award is unconstitutional."

Appellants rely on Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), for their assertion that an award of punitive damages in a libel suit "chills" the exercise of First Amendment guarantees. A careful reading of

the Gertz decision does not support appellant's contention that punitive damages are per se precluded by the First Amendment. Justice Powell, speaking for the majority in Gertz, declared that private individuals could recover damages under a state libel law "on a less demanding showing" than that mandated under the New York Times standard, providing that a state does "not impose liability without fault." Gertz, supra, at 339. The High Court further emphasized:

> "We hold that the States may not permit recovery of presumed or punitive damages, at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth. In short, the private defamation plaintiff who establishes liability under a less demanding standard than that stated in New York Times may recover only such damages as are sufficient to compensate him for the actual injury. ." Gertz, supra, at 359.

The recovery of punitive damages, under Gertz, by a public official is not per se precluded by the First Amendment. However, there must be sufficient evidence to

justify an award of compensatory damages under the proper application (emphasis added) of the New York Times rule and a punitive award cannot be founded upon mere prejudice of the jury. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). We hold that Reichel, having failed to prove "actual malice" under the New York Times test, is precluded from recovering punitive damages.

We hold alternatively that, because of our disposition of assignment of error number four, the award of punitive damages cannot stand. It is well settled, that before exemplary damages can be awarded, actual damages must be found and assessed. See e.g. Mauk v. Brundage, 68 Ohio St. 89, 99 (1903). Because of our belief that appellee failed to prove any items that are properly compensable in damages, and because of Ohio's adherence to the general rule that punitive damages are recoverable for libel per quod providing that special damages are

pleaded and proved, see Moore v. P. W. Publishing Co., Inc., 3 Ohio St. 2d 183 (1965), Cert. denied, 382 U.S. 978 (1966), we conclude the trial court's award of punitive damages, unsupported by evidence of any actual or special damages, constitutes prejudicial error. Accordingly, we sustain assignment of error twelve and thirteen.

Assignments of error number fourteen and nineteen are directed to the rejection of evidence and to the general instructions to the jury. Other specific assignments of error pertain to both of these subjects and are passed upon by the court. Any additional claims in these respects will be disregarded pursuant to App. R. 12(A) because the error is not specifically pointed out and separately briefed.

The remaining assignments of error number fifteen and eighteen will be jointly considered. The claim is made that improper argument was made to the jury. Seven items are excerpted in the brief from Mr. Reichel's

final argument as improper. Of the seven items, we find that objection was made as to item six in which reference was made to "a criminal statute in Ohio Section 3599.09 . . ." Such argument is improper and prejudicial. Gibbons v. B&O Ry. Co., 92 Ohio App. 87 (1952); Industrial Comm. v. Gillard, 41 Ohio App. 297 (1931); Montanari v. Haworth, 108 Ohio St. 8 (1923). As to item seven, objection was made to Mr. Reichel's statement that "when you decide to run for public office you give up a lot. . . " The court failed to rule on this objection; however, this argument was not so improper as to constitute error. As to the remaining five items, we find the same either not objectionable or non-prejudicial. 4 Ohio Jur. 2d App. Rev., Secs. 964, 968, 971, 975.

It is asserted that the verdict is excessive and given under the influence of passion and prejudice. Without further lengthening this opinion by specific reference to the record, we are persuaded, under the totality

of circumstances appearing in the record, and in light of the improper argument made by appellee in final argument, particularly in reference to R. C. 3599.09, that the verdict of the magnitude set forth in the judgment is excessive and appears to have been rendered under the influence of passion and prejudice. Therefore, assignments of error fifteen through eighteen are sustained.

Finding the intervention of prejudicial error in the errors assigned and argued, the judgment is reversed and final judgment entered in favor of appellants.

JUDGMENT REVERSED

Mahoney, J., Concurs in judgment and opinion except as to the disposition of the sixth assignment of error.

WILEY, J., Concurring: As to the defendants, Warren Smith and Ohio AFL-CIO, I cannot agree with the determination of the majority that "actual malice" as defined in the case of New York Times v. Sullivan, 376 U.S. 254 (1964) was not established. Furthermore, I disagree with the determination that the leaflet was not defamatory as a matter of law with the exception of the statement that Mr. Reichel's opposition to organized labor was "vicious and loaded with sarcasms and half-truths."

I concur with the majority as to the determination that the defendants-appellants Harry Mayfield and District 27, United Steelworkers, AFL-CIO, acted in good faith, relied upon Warren Smith, and had no actual knowledge of the alleged defamatory statements made in the leaflet.

As to the defendants Warren Smith and Ohio AFL-CIO, in my opinion, the facts establish "actual malice", as defined in Sullivan, supra. The record indicates that

Warren Smith had obtained a law degree and was admitted to the practice of law in Ohio prior to his appointment by Ohio AFL-CIO in 1959. For many years thereafter, he was essentially a lobbyist. He was appointed to the office of Secretary-Treasurer of Ohio AFL-CIO in 1967, elected to that office in 1968 and held that office up to and including the events giving rise to the litigation herein. His duties as Secretary-Treasurer included political activities on behalf of candidates endorsed by organized labor, lobbying in the General Assembly, and supervising six staff people and about nine clerical persons.

As a lobbyist, lawyer, and Secretary-Treasurer of the Ohio AFL-CIO, Warren Smith is an exceptionally well experienced knowledgeable person. The jury during its deliberation had the leaflet[1] which twice

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[1] See leaflet appended to opinion.

specifically referred to Reichel's anti-worker activities in 1963; whereas Reichel did not become a member of the legislature until 1967.

The leaflet emphasized "Other parts of Reichel's antiworker record" in large print and to support this statement headlined "Unemployment Insurance" and "Workmen's Compensation." Certainly, Unemployment Insurance and Workmens' Compensation are two important and sensitive areas in labor relations. Under these headings, referring to the year 1963, the leaflet stated in part:

> "* * * After 14 years of legal wrangling the Ohio Supreme Court decided the workers should have been paid. Within weeks after the decision Reichel and others amended the Ohio law to disqualified Ohio workers forced off their jobs because of strikes in another state. * * *"
>
> Workmen's Compensation
> "In 1963 Reichel assisted employer groups in inserting crippling amendments into Ohio's workmen's compensation law. Luckily for injured workers, the major amendments were declared unconstitutional by the Ohio Supreme Court. But in the

> "more than eight years of legal appeals necessary to strike these amendments down, Ohio's injured workers lost millions of dollars of compensation.* * * *"

Admittedly, Reichel was not in the legislature in 1963. The experienced and knowledgeable Warren Smith knew this. Having been active as a lobbyist and officer of the Ohio AFL-CIO in 1963, 1964, 1965 and 1966, he knew in each of those years that Reichel was not in the legislature. In his haste and zeal to publish the pamphlet in 1974, he may have forgotten temporarily that Reichel was not in the legislature in 1963. Even if temporary forgetfulness could be equated with lack of knowledge, he acted with reckless disregard. A moment's reference by Smith to documents in his own office would have furnished the necessary information. He was not confronted with the task of checking news files as mentioned in New York Times v. Sullivan, supra, at 287 and as mentioned in Gertz v. Robert Welch, Inc., 418

U.S. 323, 332 (1974); furthermore, as he, himself, was the publisher, he was not relying in good faith upon someone else.

Considering all of the facts in this case, the jury had ample evidence to answer the interrogatories as it did.[2] The evidence

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2 At the conclusion of the case, the jury answered three interrogatories:

Question No. 1
Do you find that defendant, Warren Smith, knew at the time he prepared the leaflet, which is Plaintiff's Exhibit No. 1, that any matter contained therein was false?

Yes - 7
No -

Question No. 2
Do you find that the defendant, Warren Smith, entertained serious doubts as to the truth of the publication, which is Plaintiff's Exhibit No. 1, at the time he prepared it?

Yes - 7
No -

Question No. 3
Do you find that the defendant, Warren Smith, published Plaintiff's Exhibit No. 1 with reckless disregard of whether the statements contained therein were true or false?

Yes - 7
No -

amply sustains a determination that Smith did act with "a high degree of awareness of * * * probable falsity." Garrison v. Louisiana, 379 U.S. 64, (1964); St. Amant v. Thompson, 390 U.S. 727, 731 (1968). It is further evident that harm through falsehood was intended. Henry v. Collins, 380 U.S. 356 (1965). In my opinion, there was ample evidence for the jury to determine that the leaflet was a false and malicious publication against Reichel and was published with the intent to injure his reputation and to affect him injuriously as a State Senator. 34 Ohio Jur. 2d., Libel and Slander, Sec. 3.

I further concur with the majority that the words in the publication were not libel "per se" but constituted libel "per quod." Becker v. Toulmin, 165 Ohio St. 549 (1956).

The evidentiary test of "clear and convincing evidence" and the "convincing clarity which the constitutional standard demands" are likewise met by the evidence

herein. New York Times v. Sullivan, supra. Therefore, I would find assignments of error 1, 2 and 3 not well taken as to defendants-appellants Warren Smith and AFL-CIO. Cf. Maloney v. E. W. Scripps, 43 Ohio App. 2d 105 (1974), wherein a private individual was plaintiff. (Motion to Certify overruled by Supreme Court of Ohio, April 11, 1975).

Mahoney, J., of the Ninth Appellate District, Stephenson, J., of the Fourth Appellate District, sitting by assignment in the Fifth Appellate District.

Wiley, J., retired and assigned to active duty under authority of Section 6 (C), Article IV, Ohio Constitution.

APPENDIX

LEAFLET

Every once in a while
this man likes to put on a
hard hat and pretend he is a
friend of the worker...He isn't.
Look at his record...

Richard Reichel has consistently sided with management in matters affecting labor-management relations. He is well known in the Legislature as a "built-in" lobbyist for the most conservative (Timken) management viewpoints. We in Labor did not always agree with former State Senator Ralph Regula on legislation, but Regula's positions were based on reasons. Reichel's opposition, on the other hand, is vicious and is loaded with sarcasms and half-truths.

For example, Richard Reichel in the 108th General Assembly (1969-70) reacted to the surfacing riots by supporting legislation "to bring peace to our campuses." What he didn't say is that the carefully drafted language of one bill (H.B. 72) would have covered normal strike activity. And further changes in the law would have permitted the Ohio Highway Patrol, for the first time, to be used in strike situations. These changes brought out adamant opposition not only from Labor but also from other groups such as the Buckeye Sheriffs Association.

When Reichel and his friends became convinced that the bill would not pass with these provisions in it, they supported a correcting floor amendment. But in originally supporting such legislation, Reichel knew what he was about. He was attempting in the disguise of riot legislation to do what Ohio employers have not been able to do in years ... use the Ohio Highway Patrol as a state police force to break strikes.

OTHER PARTS OF REICHEL'S ANTI-WORKER RECORD

UNEMPLOYMENT INSURANCE

Reichel has usually voted to hurt the unemployed worker. In 1963 Labor won an unemployment case involving Ford Motor Company in Canton. Workers at Ford in Canton were disqualified in 1949 from unemployment insurance because a strike in Michigan forced a lay off at their plant. The workers were disqualified from benefits even though they were neither involved nor had an interest in the Michigan strike. After 14 years of legal wrangling the Ohio Supreme Court decided the workers should have been paid. Within weeks after the decision Reichel and others amended the Ohio law to disqualified Ohio workers forced off their jobs because of strikes in another state.

WORKMEN'S COMPENSATION

In 1963 Reichel assisted employer groups in inserting crippling amendments into Ohio's workmen's compensation law. Luckily for injured workers the major amendments were declared unconstitutional by the Ohio Supreme Court. But in the more than eight years of legal appeals necessary to strike these amendments down, Ohio's injured workers lost millions of dollars of compensation.

CONSUMER LEGISLATION

Reichel has never been a friend on this type of legislation either. Ohio for a long time had one of the highest personal bankruptcy rates in the nation. Why? Federal bankruptcy referees said it was because of Ohio's unrestricted use of the cognovit note and garnishments. When legislation was proposed to restrain the use of the cognovit note and reform Ohio's garnishment law it was met by head on opposition from Reichel.

When bankers unsuccessfully proposed in 1970 legislation to remove Ohio's 8% limit on home loans, Reichel voted with the bankers.

* * *

The workers of Stark County could best serve their fellow workers in Ohio by seeing that Reichel stays home on November 5.

VOTE FOR

ROBERT FREEMAN

FOR

STATE SENATE

Issued by District 27
Steelworkers, Harry Mayfield, Director,
1330 Market Ave. N.,
Canton, Ohio 44714

183

STATE OF OHI
COUNTY OF STARK, SS.

IN THE COURT OF COMMON PLEAS

Reichel, Richard
PLAINTIFF

FILED
1976 NOV 10 AM 11:41
EUGENE C. SELL
CLERK OF COURTS
STARK COUNTY, OHIO

NO. 75-1264

vs.

Dist. 27, Steelworkers
DEFENDANT

Judgment Entry On Verdict

This day came the jury, having been duly empaneled and sworn in this case with its verdict, finding the issues of fact in favor of the plaintiff ---, and awarding the amount due to the plaintiff --- from the defendants, at the sum of $50,000 (Compensatory) $250,000 (Punitive) $300,000.00 Total

It is therefore hereby considered by the Court that the said plaintiff ---.

Richard Reichel

recover of the said defendants, District 27 Steelworkers, Harry Mayfield, Ohio AFL-CIO, Warren Smith

the amount found due by the verdict of the jury herein, in the sum of

$ 300,000.00

together with the costs of this suit.

Harold E. DeVitt
JUDGE

Dated this 10th day of November, 1976.

110

VERDICT FOR PLAINTIFF

COURT OF COMMON PLEAS, Stark County, Ohio

September Term, A.D., 1976

'76 NOV -9 PM 1:16

CLERK OF COURTS
STARK COUNTY, OHIO

Case No. 75-1264

CIVIL ACTION --- VERDICT FOR PLAINTIFF

[illegible] BEICHEL,

Plaintiff

vs

DISTRICT 27, STEELWORKERS,
RUSS HAYFIELD,
OHIO AFL-CIO,
HERBERT J. SMITH,

Defendants

We, the Jury, being duly impaneled, sworn and affirmed, find the issues in this case in favor of the Plaintiff, and assess the amount due to the Plaintiff from the Defendants at the sum of:

Compensatory Damages	$ 30 . .
Punitive Damages	$ 250 . .
TOTAL AWARD	$ 300.00

And we do so render our verdict upon the concurrence of 6 members of our Jury, that being three-fourths or more of our number. Each of us said Jurors concurring in said verdict signs his name hereto this 9 day of November, 1976.

[illegible]

"4"

[illegible]

-56-A-

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-195

RICHARD REICHEL, *Petitioner*,

v.

THE DISTRICT 27,
UNITED STEELWORKERS, et al., *Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

BRIEF FOR RESPONDENTS IN OPPOSITION

Stewart R. Jaffy
CLAYMAN & JAFFY
71 East State Street
Columbus, Ohio 43215

Counsel for Respondents

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BRIEF FOR RESPONDENTS
IN OPPOSITION

OPINION BELOW

Petitioner erroneously appeals from a "judgment" by the Supreme Court of Ohio. At page 1 of his Petition, Petitioner prays that:

> ". . .a writ of certiorari issue to review the judgment by the Supreme Court of Ohio rendered in these proceedings on May 5, 1978."

Said "decision" by the Supreme Court of Ohio (appended to the Petition for a Writ Certiorari) is merely the Supreme Court of Ohio's refusal to grant certiorari and hear the case. The final decision in this case is the decision of the Court of Appeals for Stark County, Ohio (appended as "Appendix A" to Petitioner's brief), and Petitioner did not appeal from that decision to the United States Supreme Court.

Therefore, because the Supreme Court of Ohio refused discretionary review, the proper appeal herein would have been from the judgment of the Court of Appeals for Stark County, Ohio. *Interstate Circuit, Inc. v. Dallas* (1967), 390 U.S. 676, 678; *Gallick v. Baltimore & Ohio R. Co.* (1963), 372 U.S. 108, 109; *Michigan-Wisconsin Pipe Line Co. v. Calvert* (1953), 347 U.S. 157, 159.

As Petitioner has appealed from a non-existent decision, the Petition for a Writ of Certiorari should be denied.

JURISDICTION

At page 2 of his brief, Petitioner invokes

jurisdiction under 28 U.S.C.A., Section 1254(1). This section clearly provides for review from cases in the Federal courts of appeals, and does not provide jurisdiction in this case.

Because this Court has no jurisdiction under 28 U.S.C.A., Section 1254(1), Petitioner's Writ should be denied.

QUESTIONS PRESENTED

Neither question presented by Petitioner was raised in the Ohio Court of Appeals or in Petitioner's Memorandum to the Ohio Supreme Court.

As Petitioner did not heretofore claim any constitutional deprivation under the First and Fourteenth Amendments, it is submitted the same cannot now be raised.

STATEMENT OF FACTS

This case arose out of Petitioner's unsuccessful attempt at election to the Ohio Senate in 1974. He had held the Senate seat in the Ohio Legislature by appointment.

Plaintiff claimed that a leaflet issued by the defendants was libelous and caused his election loss.

The leaflet erroneously stated that the plaintiff had voted for certain legislation which was unfavorable to the working man in 1963. Plaintiff, however, was not in the Legislature at that time.

The Ohio Court of Appeals said:

> " . . . the appellants (Respondents herein) did show that in their minds . . . (Petitioner) did assume positions as legislator which were consistent with the views they erroneously attributed to him in 1963. Therefore, there appeared no obvious reasons to doubt the factual assertions contained in the leaflet." (Parenthetical matter added.) (Opinion, Court of Appeals, set forth in Petition for Certiorari [hereinafter Pet. Cert.], page 13.)

From a verdict in Petitioner's favor, Respondents herein appealed. The Court of Appeals in Ohio reversed the judgment of the Ohio trial court and directed the verdict in Respondents' favor. The Ohio Supreme Court refused Petitioner's motion for certiorari.

Among the state issues raised in the Court of Appeals was an Assignment of Error that the plaintiff had not proven any damages. The Court of Appeals said:

> "It is elementary under Ohio law that . . . no cause of action is stated unless special damages are pleaded and proven." (Opinion, Pet. Cert., p. 33)

The Court of Appeals held that plaintiff failed to prove any special damages.

The Court of Appeals, in deciding this case on the non-state issues, said:

> "Our focus is, therefore, narrowed to the single issue of whether the judgment below is supported by clear and convincing proof that appellants published the leaflet with reckless disregard of whether the contents were true." (Opinion, Pet. Cert., p. 13)

The Court of Appeals then proceeded to hold on this issue:

> "On the basis of this evidence, we conclude that each of the appellants (Respondents herein) were entitled to a directed verdict in their favor because of the failure of Appellee (Petitioner herein) to meet his burden of proof by clear and convincing evidence that the leaflets were published with

> a high degree of awareness of probable falsity of the contents therein." (Parenthetical matter added.) (Opinion, Pet. Cert., p. 19)

With respect to the evidence, the Court of Appeals said:

> "Nor does the record reveal facts which would under any standard of liability . . . establish that there was obvious reason to doubt the veracity of the report." (Opinion, Pet. Cert., p. 23)

ARGUMENT

I

THE STATE COURT DECISION IS BASED UPON AN ADEQUATE AND INDEPENDENT NON-FEDERAL GROUND AND PRECLUDES REVIEW OF THIS CASE.

This Court has long adhered to the fundamental principle that it will not review a state court judgment based upon an adequate and independent non-federal ground, even though a federal or constitutional question may be involved. *Fox Film Corp v. Miller* (1935), 296 U.S. 207; *Herb v. Pitcairn* (1944), 324 U.S. 117.

In reversing the judgment of the trial court

herein, the Court of Appeals determined that Respondents were entitled to a directed verdict because no special damages were established to support the judgment.

The Court of Appeals correctly noted that under Ohio law, no cause of action is stated unless special damages are pleaded and proven. The Court concluded that, under Ohio law, Petitioner could not create special damages by his gasoline expense in driving to media centers on the day before the election to distribute a statement counteracting the leaflet. *Becker v. Toulmin* (1956), 165 Ohio St. 549; *Bigelow v. Brumley* (1944), 138 Ohio St. 574.

Because the Court of Appeals' disposition of this issue required it to reverse the judgment in favor of Respondents, independent of any other issues in the case, this Court lacks jurisdiction to hear this appeal.

II

THE DECISION BELOW PROPERLY APPLIED THIS COURT'S REQUIREMENTS SET FORTH IN *NEW YORK TIMES v. SULLIVAN* AND ITS PROGENY, WITH RESPECT TO PROOF OF ACTUAL MALICE IN CASES INVOLVING PUBLIC OFFICIALS.

Since the landmark case of *New York Times v. Sullivan* (1964), 376 U.S. 254, this Court has required that in a libel suit against a public official, there can be no recovery for defamation unless the statement was made with actual malice -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not. *Id.*, at 279. *New York Times* provides further that there be clear and convincing proof of such actual malice.

Although later cases have redefined actual malice (in *St. Amant v. Thompson* [1968], 390 U.S. 727, 731, the Court defined "reckless disregard" as entertaining serious doubts as to truth of the publication), this Court has not deviated from the requirement that "actual malice" be established.

In his Petition to this Court, Petitioner does not contend that the state courts have incorrectly applied the *New York Times* criteria, but instead argues that such criteria should not be applicable in an election campaign. Petitioner cites no cases for this novel theory.

Not only would acceptance of Petitioner's argument require a reversal of *New York Times*, but would be contrary to the underlying philosophy of the *New York Times* that "debate on public issues should be uninhibited, robust, wide open . . . ."

The state reviewing courts, fulfilling its obligation to make an "independent examination of the whole record", *Edwards v. South Carolina* (1963), 372 U.S. 229, 235, properly determined that there was not clear and convincing evidence of actual malice to support the trial court's judgment.

Petitioner really is asking this Court to reweigh the evidence. Such request does not present a substantial constitutional issue.

It is apparent that Petitioner points to no conflict between any Supreme Court case and the Ohio Court of Appeals' decision. Said appellate decision does not enunciate any new principle of law. The effect of the decision is limited to the Petitioner himself because the Ohio Appellate Court held that he did not meet his burden of proof.

Further, Petitioner has attempted to argue by his questions presented that he has been deprived of unspecified rights under the First and Fourteenth Amendments of the United States Constitution by the action of the Ohio Supreme Court. Significantly, in his Memorandum urging the Ohio Supreme Court to hear his case, Petitioner did not raise any claim of constitutional deprivation under the First or Fourteenth Amendments. Nor did he in his argument to the Ohio Court of Appeals raise any claim of federal constitutional deprivation.

CONCLUSION

Petitioner has offered no valid reason for the Petition for a Writ of Certiorari to be accepted. As heretofore set forth, there is a valid state issue which resolves this cause independent of any other argument.

Petitioner in his attempt to raise a federal constitutional issue, presents questions not previously raised.

Petitioner raises no substantial constitutional question, but rather is really asking the Court to re-weigh the evidence.

For the aforesaid reasons the Writ should be refused.

Respectfully submitted,

Stewart R. Jaffy

Stewart R. Jaffy
CLAYMAN & JAFFY
71 East State Street
Columbus, Ohio 43215
Tel: (614) 228-6148

Attorney for Respondents

PROOF OF SERVICE

I, Stewart R. Jaffy, attorney for Respondents herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 3rd day of August, 1978, I served copies of the foregoing Respondents' Brief in Opposition upon Edgar W. Jones, attorney for Petitioner, addressed to him at Amerman, Burt & Jones Co., 250 Peoples-Merchants Trust Building, Canton, Ohio 44702, by depositing same in the United States mail, postage prepaid. I certify that all parties required to be served have been served.

Stewart R. Jaffy

Stewart R. Jaffy

Attorney for Respondents